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MASTER PYRODOR SDN BHD v. TAI THONG FLOWER NURSERY SDN BHD

HIGH COURT MALAYA, IPOH
LEE SWEE SENG J
[SUIT NO: 22NCVC-2-2011]
B 29 JANUARY 2016

CIVIL PROCEDURE: *Judicial precedent – Stare decisis – Remission of case from Court of Appeal to High Court – Specific directions given by Court of Appeal – Whether to be followed as part of doctrine of binding precedent – Whether departure*
C *by High Court would tantamount to setting aside decision of Court of Appeal*

CIVIL PROCEDURE: *Locus standi – Sale of land – Absence of approval from Estate Land Board for transfer of land – Whether purchaser obtained title illegally – Whether title defeasible – Whether lacked locus standi to commence action –*
D *National Land Code, ss. 214A & 340*

LAND LAW: *Transfer – Estate land – Absence of approval from Estate Land Board for transfer of land – Transfer in contravention of s. 214A(1) of National Land Code – Whether registration of title under void instrument excluded from indefeasibility protection – Whether transfer liable to be set aside – National Land Code, s. 340*

E The plaintiff entered into a sale and purchase agreement for the sale of a piece of subdivided land from its registered owner, Cameron Fresh Farm Sdn Bhd ('Cameron Fresh Farm'). However, the approval for subdivision of the land was only obtained from the Estate Land Board ('ELB') subsequently by Cameron Fresh Farm. The plaintiff, as the present registered owner, brought
F an action for damages for trespass against the defendant who had been occupying and continued to occupy part of the land. At the trial in the first instance, the defendant raised, for the first time, that no approval for transfer of the land to the plaintiff had been obtained from ELB, a requirement under s. 214A of the National Land Code ('NLC'), and submitted no case to
G answer. The High Court granted judgment to the plaintiff. The defendant's appeal to the Court of Appeal ('CA') was allowed and the judgment of the High Court was set aside. The CA remitted the matter back to the High Court to hear further evidence from the plaintiff as to whether approval of the ELB had been obtained for the transfer of the land. The stand taken by the CA
H was that, if there was no approval from the ELB, then the plaintiff would be in no position to bring the action and the plaintiff's claim would stand dismissed. At the rehearing, the plaintiff admitted that no approval had been obtained from the ELB for the transfer of the land and adduced no further evidence. The defendant, again, submitted no case to answer. The plaintiff,
I however, argued that it was still entitled to judgment as the CA had not considered the full import and implication of registered ownership under s. 89 of the NLC and that the defendant being a trespasser, had no *locus standi*

to challenge the plaintiff's registered ownership of the land. It was further submitted that the opinion expressed by the CA was at best only tentative and that *res judicata* did not apply. In short, the plaintiff submitted that the court was at liberty to come to its own decision in spite of the directions given by the CA.

Held (dismissing plaintiff's claim with costs):

(1) Whilst an appellate court may not dictate to a trial court the decision it should make when taking further evidence upon a matter being remitted to it, for further evidence to be adduced, the directions of the CA must nevertheless be followed as part of the doctrine of binding precedent and as required of judicial discipline and deference. The CA did not speak in vain. The tenor and thrust from the text of the CA's judgment was that if there had been no approval obtained for the transfer of the land to the plaintiff, then the plaintiff's title had been obtained illegally in contravention of the expressed prohibition under s. 214A of the NLC and the transfer instrument was void by virtue of s. 24 of the Contracts Act 1950 and the transfer liable to be set aside. The plaintiff, having founded its claim for trespass on its title as the registered owner having possession, would fail; that title having been obtained in breach of s. 214A of the NLC is defeasible. (para 10)

(2) The registration of any title under a void instrument excludes such registration from the indefeasibility protection of s. 340 of the NLC. The evidence did not support the plaintiff's claim to the right of possession of the subject land. The remitting of the case back to the High Court was for a very specific and restrictive purpose, *ie*, to adduce evidence of the approval of the ELB. Had the evidence of no prior approval of the ELB been brought clearly before the CA, there was no doubt that the CA would not only have allowed the defendant's appeal but that the plaintiff's case would not have been remitted back to the High Court for further evidence to be adduced by the plaintiff on the said approval. For this court to come to a different decision would be tantamount to setting aside the CA's decision. (para 11)

(3) It did not matter that the CA did not specifically refer to s. 89 of the NLC. If the plaintiff had been aggrieved by the reasoning of the CA in its failure to consider s. 89 of the NLC which, if taken into consideration, would have cemented the plaintiff's position as the registered owner with all the rights of ownership to successfully bring an action for trespass against the defendant, then the plaintiff should have sought leave to appeal to the Federal Court. However, it did not. Where the CA has pronounced on the effect of non-compliance with s. 214A of the NLC *vis-a-vis* the position of the registered proprietor to bring an action for trespass, such a pronouncement is binding on the

A High Court and more so when it is with respect to the same case that had been remitted back to the High Court to hear evidence of the ELB's approval, if there is. The High Court had no business to reinterpret the position of the law and certainly not to vary what the CA had decided. (para 13)

B **(4)** Section 89 of the NLC is the *sine quo non* of the *Torrens* system. There was finality in the CA's decision on the effect of the absence of approval from ELB for the transfer of the land and the issue should not be re-litigated under the guise that s. 89 of the NLC had not been considered by the CA. The issue was *res judicata*. Hence, there was no room for the C plaintiff to argue that the CA would have come to a different conclusion had it directed its mind to s. 89 of the NLC on the conclusiveness of the registered document of title with respect to the plaintiff's registered ownership. (paras 15, 16 & 23)

D **(5)** The question of the need for a frontal attack or challenge to the title by a party having the *locus* to do so does not arise because one is dealing with an illegal act prohibited by the clear words of s. 214A of the NLC. A proprietor who obtained registration of his title illegally has no *locus standi* to found an action grounded on his registered title. The defendant, even if he be a trespasser, could not be stopped from challenging the E plaintiff's title which, on the face of it, had been registered in clear breach of s. 214A of the NLC. Hence, the plaintiff, having gotten the title illegally, could not have the *locus* to commence an action for trespass. (paras 32, 34 & 35)

Case(s) referred to:

F *All Malayan Estates Staff Union v. Rajasegaran & Ors [2006] 4 CLJ 195 FC* ***(refd)***
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***
Browne v. Dawson [1840] 12 Ad & El 624 ***(refd)***
C (A Minor) v. Hackney London Borough Council [1996] 1 WLR 789 ***(refd)***
G *Government of the Federation of Malaya v. Surinder Singh Kanda [1960] 1 LNS 30 HC* ***(refd)***
M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 SC ***(refd)***
Master Pyrodor Sdn Bhd v. Tai Thong Flower Nursery Sdn Bhd [2013] 10 CLJ 467 HC ***(refd)***
H *McPhail v. Persons, Names Unknown; Bristol Corporation v. Ross and Another [1973] 3 WLR 71* ***(refd)***
Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***
OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd [1997] 2 CLJ 534 CA ***(refd)***
Perbadanan Kemajuan Kraftangan Malaysia v. DW Margaret David Wilson [2010] 5 CLJ 899 FC ***(refd)***
I *Periasamy Sinnappan v. PP [1996] 3 CLJ 187 CA* ***(refd)***
Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 4 CLJ 105 FC ***(refd)***

Punca Klasik Sdn Bhd v. Foh Chong & Sons Sdn Bhd & Ors [1998] 1 CLJ 601 HC ***(dist)***
Sidek Hj Muhamad & Ors v. The Government Of The State Of Perak & Ors [1982] CLJ 244; [1982] CLJ (Rep) 321 FC ***(dist)***
Tai Thong Flower Nursery Sdn Bhd v. Master Pyrodor Sdn Bhd [2014] 9 CLJ 74 CA ***(refd)***
Teh Bee v. K Maruthamuthu [1977] 1 LNS 134 FC ***(refd)***
Union of India v. IC Lala (1973) 2 SCC 72 ***(refd)***
United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352 ***(refd)***
Wong Yew Kwan v. Wong Yu Ke & Anor [2010] 2 CLJ 703 CA ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 24
National Land Code, ss. 89, 214A(1), (2), 340(1), (2)(b), (c)

For the plaintiff - Porres Royan (C Sri Kumar & Jaqdesh Singh with him); M/s Kumar Partnership
For the defendant - Chan Kok Keong (Cheang Lek Choy with him); M/s Chan & Assocs

Reported by S Barathi

JUDGMENT

Lee Swee Seng J:

[1] The plaintiff bought a piece of subdivided land from its registered owner Cameron Fresh Farm Sdn Bhd. It is about 20 acres of agricultural land in Cameron Highlands. This subject land was part of an earlier bigger piece of land held under a single title of 502 acres. Cameron Fresh Farm Sdn Bhd had applied for subdivision of the bigger piece of land into 2 pieces; one of 20 acres and another of 482 acres. Approval of the Estate Land Board ("ELB") under the National Land Code ("NLC") was obtained for the subdivision on 23 December 2008.

[2] The sale and purchase agreement for the sale of the subject land was entered into between Cameron Fresh Farm Sdn Bhd and the plaintiff on 26 February 2007. That was before the approval of the ELB for the subdivision. The plaintiff became the registered owner of the subject land. It brought an action for damages for trespass against the defendant who had been occupying and continues to occupy part of the subject land, planting its crops and vegetables. It also prayed for vacant possession. The only defence raised was that a certain individual had given them permission to occupy the land.

[3] At the trial in the first instance the defendant raised for the first time that no approval of the ELB for the transfer had been obtained for the transfer of the land to the plaintiff. It is common ground that the subject land is an estate land and that approval of the ELB would be required under s. 214A of the NLC.

[4] That took the plaintiff by surprise and all that the plaintiff could say was that it had left everything to its solicitors handling the transaction and verily believed that all regulatory requirements had been complied with. The defendant submitted no case to answer and the High Court granted judgment for the plaintiff. See the case of *Master Pyrodor Sdn Bhd v. Tai Thong Flower Nursery Sdn Bhd* [2013] 10 CLJ 467.

[5] On appeal to the Court of Appeal by the defendant, the Court of Appeal allowed the appeal and set aside the judgment of the High Court. It also remitted the matter back to the High Court to hear further evidence from the plaintiff as to whether approval of the ELB had been obtained for the transfer of the subject land to the plaintiff. The stand taken by the Court of Appeal is that if there was no approval from the ELB for the transfer of the subject land to the plaintiff, then the plaintiff would be in no position to bring this action and that the plaintiff's claim would stand dismissed.

Dispute

[6] At the rehearing, the plaintiff, now represented by a different set of solicitors, admitted that no approval of the ELB had been obtained for the transfer of the subject land. The plaintiff adduced no further evidence and the defendant, as expected, submitted no case to answer. The defendant took the stand that as what was an issue then, is no longer an issue now, they would not be calling any witnesses in as much as the plaintiff cannot be reopening their case.

[7] Learned counsel for the plaintiff, nevertheless, argued that the plaintiff was still entitled to judgment as the Court of Appeal had not considered the full import and implication of registered ownership under s. 89 of the NLC in its judgment and that the defendant being a trespasser, has no *locus* to challenge the plaintiff's registered ownership of the subject land. It was further submitted that the opinion expressed by the Court of Appeal was at best only tentative and that *res judicata* does not apply. In short, it was submitted that the High Court was at liberty to come to its own decision in spite of the directions given by the Court of Appeal.

[8] Learned counsel for the defendant vigorously objected to this. It was not unlike waving the flag of victory, when with confident poise and considerable persuasion, he voiced vehemently that there being an admission of no approval from the ELB for the transfer of the subject land to the plaintiff, the matter ended there as the direction of the Court of Appeal was clear and unambiguous; it was to give a chance to the plaintiff to adduce evidence of the ELB's approval and that being not forthcoming, the plaintiff's claim must stand dismissed.

Deliberation

The Binding Precedent Point

[9] Learned counsel for the plaintiff, Mr Porres Ryan, submitted that this court is at liberty to come to its own decision as the opinion of the Court of Appeal in allowing the defendant's appeal and setting aside the whole of the judgment of the High Court and remitting the matter to the High Court for the plaintiff to adduce evidence of the ELB, was a tentative opinion awaiting full argument at the High Court after evidence of the approval of the ELB had been adduced. In effect, the point posited by learned counsel is that upon admission that there was no approval of the ELB, the plaintiff could still argue afresh a matter said not to have been canvassed in the Court of Appeal, ie, the effect of s. 89 of the NLC *vis-a-vis* s. 214A and s. 340 of the NLC.

[10] Whilst an appellate court may not dictate to a trial court the decision it should make when taking further evidence upon a matter being remitted to it for further evidence to be adduced, the directions of the Court of Appeal here, must nevertheless be followed, as part of the doctrine of binding precedent and as required of judicial discipline and deference. The Court of Appeal does not speak in vain. The tenor and thrust from the text of the Court of Appeal's judgment is that if there had been no approval obtained for the transfer of the subject land to the plaintiff, then the plaintiff's title had been obtained illegally in contravention of the expressed prohibition under s. 214A of the NLC and the transfer instrument is void by virtue of s. 24 of the Contracts Act 1950 and the transfer liable to be set aside. The plaintiff, having founded its claim for trespass on its title as registered owner having possession, would fail; that title having been obtained in breach of s. 214A of the NLC is defeasible. The reasoning of the Court of Appeal in *Tai Thong Flower Nursery Sdn Bhd v. Master Pyrodor Sdn Bhd* [2014] 9 CLJ 74; [2014] 6 MLJ 341 is reproduced below:

> [53] The requirement that the approval of the estate land board must be obtained before the execution of any agreement for the transfer, conveyance or disposal of estate land or any portion of it was reinforced by the provisions contained in para. 214A(10A)(b). The moment an agreement is executed without the approval of the estate land board for the transfer, conveyance or disposal of estate land, such execution became conclusive proof that the transfer, conveyance or disposal was being done in contravention of the clear prohibition in sub-s. 214A(1).
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> [54] While s. 214A of the NLC did not itself provide that an agreement to transfer, convey or dispose of estate land without the approval of the estate land board was void, the fact that such transfer, conveyance or disposal was prohibited by sub-s. 214A(1), and the act of transferring, conveying or disposing constituted an offence under sub-s. 214A(10A)(a), meant that *any contract for such transfer, conveyance or disposal, and consequently any memorandum of transfer pursuant to such contract, was liable to be struck down as being void for illegality under s. 24 of the Contracts Act 1950.*

A [55] *The registration of any title under a void instrument excludes such registration from the indefeasibility protection of s. 340 of the NLC.*

[56] As the plaintiff's claim to the right of possession of the subject land was based on its claim to be the registered owner of the subject land, we were of the considered view that the evidence before us and the High
B Court did not support that claim of that right.

[57] We therefore allowed the appeal and set aside the orders of the High Court.

[58] However, *the documents in the appendices attached to the plaintiff's submissions showed that there was approval of the estate land board for the*
C *subdivision of the original land, and alluded to there being in existence approval of the estate land board for the transfer of the subject land.*

[59] In those circumstances, **we ordered that the matter be remitted to the High Court for the plaintiff to adduce the evidence of such approvals**. The defendant in turn was granted liberty to elect afresh whether to
D adduce evidence. We ordered costs to follow the event in the High Court. (emphasis added)

[11] In the light of the clear language of the Court of Appeal above, this court upon being appraised with the admission of no approval from the ELB for the agreement to transfer the subject land and consequently with no
E further evidence to be adduced by the plaintiff, has only one decision to make and that is to dismiss the plaintiff's claim. The remitting of the case back to the High Court was for a very specific and restrictive purpose: to adduce evidence of the approval of the ELB. Had the evidence of no prior approval of the ELB being clearly before the Court of Appeal, there is no doubt that
F the Court of Appeal would not only have allowed the defendant's appeal but that the plaintiff's case would not have been remitted back to the High Court for further evidence to be adduced by the plaintiff on the said approval. There is no other way to escape the natural consequence of the plaintiff's claim being dismissed in the light of the opinion expressed by the Court of Appeal. For this court to now come to a different decision would be
G tantamount to setting aside the Court of Appeal's decision; and while tempted by the plaintiff so to do in its espousing of its legitimate claim against what it considers to be a trespasser bereft of any legitimate interest in the subject land, I must resist from exploring that suggestion, lest I succumb to it. Judicial discipline and deference would constrain this court to respect the
H decision of the Court of Appeal and abide by its directions. I need to venture no further than to repeat the reminder of the Federal Court in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177; [2006] 4 MLJ 113 as follows:

I [45] ... In order to appreciate the importance of adhering to the doctrine of *stare decisis* useful references may be made to *Cassell & Co Ltd v Broome & Anor* [1972] 1 All ER 801 where Lord Hailsham said at p. 809:

> The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v. Bristol Aeroplane Co Ltd* [1944] 2 All ER 293 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even this House, since it has taken freedom to review its own decisions, will do so cautiously. That this is so is apparent from the terms of the declaration of 1966 itself where Lord Gardiner LC said:
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> > Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

[12] In *Periasamy Sinnappan v. PP* [1996] 3 CLJ 187; [1996] 2 MLJ 557 at pp. 213-214 (CLJ); p. 582 (MLJ) the following admonishment was issued:

> Lastly, the learned appellate judge did not sufficiently address his mind to the decision in *Khoo Hi Chiang*. We find the cavalier fashion in which he approached the judgment of a five-member bench of the Supreme Court in a case which was an authority binding upon him to be quite appalling. We are convinced that the learned appellate judge ought not to have brushed it aside as he did.
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> We may add that it does not augur well for judicial discipline when a High Court judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of *stare decisis*.
>
> We trust that the occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this court and of the Federal Court and **they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein**. (emphasis added)

[13] The fact that the Court of Appeal does not refer specifically to s. 89 of the NLC does not matter a jot. If the plaintiff had been aggrieved by the reasoning of the Court of Appeal in its failure to consider s. 89 of the NLC which if taken into consideration, would have cemented the plaintiff's position as registered owner with all the rights of ownership to successfully bring an action for trespass against the defendant, then the plaintiff should have sought leave to appeal to the Federal Court. It did not; rather it was the defendant that sought leave to appeal to the Federal Court but failed. At any rate the plaintiff could always appeal to the Court of Appeal against this court's decision and perhaps persuade another forum of the Court of Appeal

on the effect of s. 89 of the NLC on a case where the registered owner's title had been obtained in contravention of s. 214A of the NLC and the registered owner's right to bring an action in trespass. Where the Court of Appeal has pronounced on the effect of non-compliance with s. 214A of the NLC *vis-a-vis* the position of the registered proprietor to bring an action for trespass, such a pronouncement is binding on the High Court and more so when it is with respect to the same case that has now been remitted back to the High Court to hear evidence of the ELB's approval if there is. The High Court has no business to reinterpret the position of the law and certainly not to vary what the Court of Appeal had decided. This court dares not even contemplate such a possibility and stands clear of encroaching into prohibited province under the entrenched principle of *stare decisis*. The point was eloquently enunciated by the Federal Court in *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 4 CLJ 195; [2006] 6 MLJ 97 at p. 223 (CLJ); p. 116 (MLJ) as follows:

> [23] This rule of public policy is encapsulated in Interpretation Acts 1967 s. 41(a) of the which provides that the proceedings of a board, commission, committee or similar body established by law shall not be invalidated by any defect afterwards discovered in the appointment or qualification of a person purporting to be a member. The legal position is therefore clear. Even though the appointment of the respondent is invalid the awards handed down by him were done so in his capacity as a Chairman of the Industrial Court and are not a nullity on grounds of public policy. They remain valid. It is absolutely necessary for us to make this clarification in order to prevent a High Court from declaring a judgment of the Court of Appeal or the Federal Court based on an award of the respondent as illegal and thereby being of no binding effect in total disregard and blissful ignorance of the doctrine of *stare decisis*. Such a pronouncement on an order made by the Court of Appeal or the Federal Court may be varied, if the need arises, only at the appropriate appellate level. It must be stressed that where the order was made by the Federal Court it may be varied only by the Federal Court itself and not even by the Court of Appeal. Any deviation from this salutary and well-entrenched rule will give rise to judicial chaos and anarchy thereby endangering and undermining the constitutional and democratic framework of our cherished society.

[14] Here there is no room whatsoever of distinguishing the facts as the facts have not changed in that no further evidence was adduced upon the same case being remitted to the High Court for further evidence to be adduced on what the Court of Appeal alluded to as a possibility that the ELB's approval might have been obtained.

The *Res Judicata* Point

[15] There is also an equally compelling argument of Mr Chan Kok Keong, learned counsel for the defendant. It is the *res judicata* point. The matter on the effect of the absence of an approval from the ELB for the transfer having being decided by the Court of Appeal against the matrix of facts which are

substantially not in dispute, there is finality in that decision and it is not for the issue to be relitigated again under the guise that s. 89 of the NLC had not been considered by the Court of Appeal. The estoppel here is more particularly an issue estoppel. As explained in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 at p. 793 (CLJ); pp. 199 to 200 (MLJ):

> On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties.

[16] Section 89 of the NLC is the *sine quo non* of the Torrens system of title by registration where the title is everything. One does not have to go behind the title because the title is conclusive evidence of one's registered interest and in this case, the plaintiff's proprietary interest, upon which it had founded its claim for possession and hence its right to bring an action for damages for trespass and an order to evict the defendant whom the plaintiff as registered owner considered to be a trespasser on to the subject land. Section 89 of the NLC declares as follows:

> 89. Conclusiveness of register documents of title.
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> **Every register document of title duly registered** under this Chapter shall, **subject to the provisions of this Act, be conclusive evidence**:
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> (a) that **title to the land described therein is vested in the person or body for the time being named therein as proprietor**; and
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> (b) of the conditions, restrictions in interest and other provisions subject to which the land is for the time being held by that person or body, so far as the same are required by any provision of this Act to be specified or referred to in that document. (emphasis added)

[17] The conclusiveness of the title is the cornerstone of the Torrens system of title by registration as we know it. Even that conclusiveness and finality has its exceptions as provided for under s. 340 of the NLC when the title or interest had been obtained by fraud or forgery, or effected through a void or insufficient instrument subject again to the exceptions in the case of a subsequent transfer in what has come to be regarded as a case of deferred indefeasibility under the NLC.

[18] The fact that s. 89 does not trump the exceptions to indefeasibility of title or interest registered as contained in s. 340 of the NLC is built into s. 89 itself: "Every register document of title duly registered under this chapter shall, **subject to the provisions of this Act**, be conclusive evidence -" (emphasis added). In other words the conclusiveness is circumscribed by circumstances set out in s. 340 of the NLC for example.

[19] In *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105, 129 Mohamad Dzaiddin FCJ (as he then was) referred to the judgment of Neal J in *Government of the Federation of Malaya v. Surinder Singh Kanda* [1960] 1 LNS 30; [1961] 27 MLJ 121 case, in the following terms:

> Datuk Foo laid stress on the words 'subject to' by relying on the judgment of Neal J in *Government of the Federation of Malaya v. Surinder Singh Kanda* [1961] 27 MLJ 121 at p. 138:
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> > To test the conclusion to which I have come by following the method of approach adopted by the Attorney General in his argument and endeavouring to give to the words, **'subject to', their ordinary meaning … 'subject to' must mean from that point of view 'swallowed up' or 'negative by'**. (emphasis added)

[20] More than that, s. 214A of the NLC is in the nature of a *non-obstante* clause for it is prefaced with the all-encompassing expression designed to give it pre-eminence: "Notwithstanding anything to the contrary in this Act, ... " It trumps all other provisions of the Act because of its expressed overriding effect. The Federal Court in *Perbadanan Kemajuan Kraftangan Malaysia v. DW Margaret David Wilson* [2010] 5 CLJ 899, speaking through Heliliah Mohamed Yusoff FCJ noted that "[19] ... The term 'notwithstanding' means generally 'not to stand against' or 'in the way' or 'overriding'. and went on to cite with approval a quote from the judgment of the Indian Supreme Court in *Union of India v. IC Lala* (1973) 2 SCC 72 at p. 77 which is as follows:

> The words notwithstanding anything contained in the Code of Criminal Procedure found at the beginning of s. 5A(1) of the Prevention of Corruption Act 1947 (now s. 17 Prevention of Corruption Act 1988) merely carved out a limited exemption from the provision of the Code of Criminal Procedure in so far as they limit the class of persons who are competent to investigate offences mentioned in the section and to arrest without warrant. It does not mean that the whole of the Code of criminal procedure ... is made inapplicable.

[21] Whilst s. 340 of the NLC deals with indefeasibility of the registered title or interest save for the vitiating factors and the exceptions to it, s. 89 of the NLC deals with the conclusiveness of the register document of title. The two concepts are not antithetical to each other but rather that both are complimentary to each other. One's title is no longer conclusive evidence of one's registered title of interest if it is obtained in contravention of s. 214A of the NLC. That is the effect of the *non-obstante* clause. However one's title obtained not in contravention of s. 214A remains conclusive of one's registered title or interest which is indefeasible until it is rendered defeasible for the vitiating factors in s. 340(2) of the NLC.

[22] What the Court of Appeal decided was that a transfer, conveyance or disposal is void for contravention of s. 214A of the NLC because of s. 24 of the Contracts Act 1950 in that it is void for illegality and that the registration of the title under a void instrument excludes such registration from the indefeasibility protection of s. 340 of the NLC. A

[23] Now that learned counsel for the plaintiff as registered owner had conceded that indeed no approval had been given by the ELB for the transfer, the issue of the effect of the transfer having being decided by the Court of Appeal, the issue has become *res*. There is no room for learned counsel for the plaintiff to now say that the Court of Appeal would have come to a different conclusion had it directed its mind to s. 89 of the NLC on the conclusiveness of the register document or title with respect to the plaintiff's registered ownership. B C

[24] To allow that would be to fall foul of the principle that a party cannot proceed in instalments in arguing its claim and case, which is another perspective of the issue estoppel principle. His Lordship Abdul Malek Ahmad JCA (as he then was) in the Court of Appeal case of *OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd* [1997] 2 CLJ 534; [1997] 2 MLJ 544 referred to the helpful explanation given by Simon Brown LJ in *C (A Minor) v. Hackney London Borough Council* [1996] 1 WLR 789 at pp. 792 and 793 as follows: D E

> Before turning to consider these reasons and Counsel's arguments upon the appeal, it is convenient first to indicate something of the law governing this issue.
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> From the several authorities referred to during the course of argument I derive these central principles. F
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> (1) The considerations of public policy underlying the plea of *res judicata* are enshrined in two Latin maxims: *nemo debet bis vexari pro una et eadem causa* and *interest reipublicae ut sit finis litium.*
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> (2) The plea of *res judicata* encompasses two distinct forms of estoppel: cause of action estoppel and issue estoppel. G
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> (3) "Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter.
>
> In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment": see *Arnold v. National Westminster Bank Plc.* [1991] 2 AC 93, 104. H
>
> (4) *Issue estoppel represents an extension of the doctrine of res judicata to include a bar on the subsequent litigation not only of all decided issues whose resolution was essential to the determination of earlier proceedings but also "to every point which properly belonged to the subject of litigation, and which the parties,* I

A *exercising reasonable diligence, might have brought forward at the time*": see *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb* [1966] 1 QB 630, 643, per Diplock LJ, quoting from *Henderson v. Henderson* [1843] 3 Hare 100, 115. As Lord Keith of Kinkel put it in *Arnold v. National Westminster Bank Plc.* [1991] 2 AC 93, 106:

B *Issue estoppel, too, has been extended to cover not only the case where a particular point has been raised and specifically determined in the earlier proceedings, but also that where in the subsequent proceedings it is sought to raise a point which might have been but was not raised in the earlier.*

(5) "The point" which might have been but was not raised in the earlier proceedings may itself be a cause of action.

C

In *Talbot v. Berkshire County Council* [1994] QB 290, 301 Mann LJ spoke of the rule as "a salutary one", observing that "it prevents prolixity in litigation and encourages the earliest resolution of disputes".

D (6) In issue estoppel cases, the plea of *res judicata* will not be applied where to do so would cause injustice. The "special circumstance" (the phrase used in several of the authorities) justifying the non-application of the rule ordinarily arise where further material becomes available which could not by reasonable diligence have been adduced in the earlier proceedings, or where (as in *Arnold v.*

E *National Westminster Bank Plc.* [1991] 2 AC 93) there has been a change or changed perception of the law. (emphasis added)

[25] As the issue had been argued in the Court of Appeal with respect to the consequence of illegality of a transfer procured without the ELB's approval, it is not then for the plaintiff to argue that under s. 89 of the NLC

F the title is nevertheless conclusive of the plaintiff as the registered proprietor until and unless it is set aside. If that was not argued then it is too late in the day to now in effect saying that the Court of Appeal had decided *per incuriam*. Even if it is, the plaintiff must have it corrected by another *corum* of the Court of Appeal and not by this High Court.

G **The Illegality Point**

[26] The present case is not one where for a lack of frontal attack on the plaintiff's title, its registered title is considered conclusive and indefeasible against the world. It is one where by the plaintiff's own admission, it had become registered owner in contravention of s. 214A of the NLC. The Court

H of Appeal has held that such a title does not have the protection of indefeasibility. The plaintiff had gotten onto the title illegally. It had founded its claim on its right to possession premised on its registered title. For the court to allow the plaintiff to so pursue this action for trespass would be to close its eyes to illegality and indeed to condone it. Whilst the plaintiff was

I more concerned with the defendant's lack of *locus* to raise this issue of illegality, the Court of Appeal was rightly more concerned with the plaintiff's

locus to bring this action if in the first place, it had become the registered proprietor without the prior approval of the ELB in clear contravention of s. 214A of the NLC.

[27] Anyone of course can raise the issue of illegality because everyone should be concerned that the law is followed especially if an action is founded on an illegal act. This is not a case where the plaintiff is claiming possession based on his tenancy with a registered owner against an occupier of the subject land. This is a case where the defendant is raising the fact that the plaintiff had gotten on to the title illegally and once raised, the court would have to appraise it and decide if this is so, for otherwise it would be allowing and indeed assisting the plaintiff's claim grounded on an illegal act. As was said from time immemorial: "No foul hands shall touch the pure fountain of justice."

[28] In *Teh Bee v. K Maruthamuthu* [1977] 1 LNS 134; [1977] 2 MLJ 7 at p. 12, the Federal Court in allowing the plaintiff's claim for trespass based on her registered ownership was influenced by the fact that the State Authority in allowing her registration of title even though the period for her payment of the land revenue for late registration had expired, must have allowed her an extension to pay. It was not a case where the State Authority had acted contrary to an express prohibition of the NLC or that the State Authority had acted *ultra vires* its powers under the NLC or of the State Land Rules. This is borne out in the lucid exposition of the law by Ali AG CJ (Malaya) in the Federal Court at p. 12 as follows:

> On the evidence at the trial it is clear that the appellant was the only applicant for the alienation of the land in question. There was no other applicant to whom it could have been alienated after the approval to the applicant lapsed on her failure to pay the amount $4,327.50 within the specified time. But the State Authority did not seem to have any intention of giving or alienating the land to anyone else other than the appellant. *The fact that she was registered as proprietress in April 1968 necessarily raised the inference that the State Authority on the amount having been paid in October 1967 had given fresh approval. The reason for the provision relating to the lapse of approval under section 81(2) of the Code, in my view, is to enable the State Authority to give the land to someone else in the event the approved applicant does not want the land or is unable to pay the necessary fees under section 81(1). It was clearly not intended to impose any restriction on the State Authority's power of disposal.*
>
> There is also another much more important reason why this appeal should be allowed. Under the Torrens system the register is everything. So said SK Das on p. 102 of his book on the Torrens system in Malaya. I need only refer to two Privy Council cases, *Creelman & Anor v. Hudson Bay Insurance Company* [1920] AC 194 and *Alan Frederic Frazer v. Douglas Hamilton Walker* [1967] 1 AC 569 which decided to the same effect.
>
> In *Creelman & Anor. v. Hudson Bay Insurance Company* which was an appeal from British Columbia, Lord Buckmaster delivering the judgment of the Judicial Committee said on page 197:

> Their Lordships are unable to accede to either of these propositions. In their opinion the certificate of title referred to in section 22 of the Land Registry Act is a certificate which, while it remains unaltered or unchallenged upon the register, is one which every purchaser is bound to accept. And to enable an investigation to take place as to the right of the person to appear upon the register when he holds the certificate which is the evidence of his title, would be to defeat the very purpose and object of the statute of registration.

In *Alan Frederic Frazer v. Douglas Hamilton Walker* which was an appeal from New Zealand Lord Wilberforce said on page 580:

> It is in fact the registration and not its antecedents which vests and divests title.

I would, therefore, set aside the judgment of the Appeal Court and restore the judgment of the trial Magistrate. (emphasis added)

[29] Had the plaintiff in *Teh Bee*'s case above obtained her registration of title under a void instrument the effect would have been that the title was registered illegally and that when she instituted the action for trespass she would have no *locus standi* as she was not a lawfully registered proprietor. To that extent the position of the High Court in *Teh Bee*'s case *(supra)* at p. 10 is still good law in a case where the State has acted *ultra vires* its powers and proceeded to register a transfer in breach of the NLC. His Lordship Ajaib Singh J opined as follows:

> *... It will be seen that the act of registration per se is paramount and when registered a title becomes indefeasible and remains so unless and until declared otherwise by the court which can only be done if the title can be successfully challenged within the somewhat restricted scope of the exceptions stated in section 340*. Non-compliance with the statutory provisions relating to the mode of acquiring the alienation of state land may not render a registration invalid but *if the contravention is of a provision which is vital and fundamental to the very existence of the power of the state authority under which it may approve the alienation of state land, in other words, if it is not a mere non-compliance with procedure but where the state authority purports to act in pursuance of a power for which no provision is made anywhere in the National Land Code then I think that the registration of title which follows the unauthorised act of the state authority is illegal and a nullity*. (emphasis added)

[30] Consequently his Lordship Ajaib Singh J came to this conclusion at p. 11:

> I held that in the present case the alienation of the land under qualified title to the respondent did not involve a mere irregularity or non-compliance with the statutory procedure relating to the method of acquiring alienation of qualified title but that *the state authority had acted ultra vires the National Land Code and therefore the alienation of the land under qualified title was illegal and a nullity. Consequently, the conclusiveness of title and the indefeasibility provisions in the Code were rendered irrelevant and inapplicable. In the event, I held that when she instituted proceedings against the appellant the*

respondent had no locus standi in the matter as she was not a lawfully registered proprietor of the land. I accordingly allowed the appeal with costs. (emphasis added)

[31] The Federal Court had reversed His Lordship Ajaib Singh's decision in *Teh Bee*'s case *(supra)* because the Federal Court took the view that acceptance of late payment of the land revenue for alienation was within the power of the State Authority and there was nothing illegal or *ultra vires* in the registration of the alienated land in the plaintiff's name.

[32] The above proposition of law that a proprietor who obtained registration of his title illegally has no *locus standi* to found an action grounded on his registered title is still good law and was cited with approval by the Supreme Court in *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14; [1994] 1 MLJ 294 at p. 23-24 (CLJ); p. 310 (MLJ). In setting aside the registration of a successful bidder of an auctioned property under the NLC when challenged by the chargor who had been deprived of being heard in an extension of time to pay the balance auctioned price of the property, the Supreme Court held at pp. 310-311:

We agree with what was stated in the judgments above. In our present appeal, failure to comply with the statutory requirements of paras (a) and (b) of s. 258 and para (c) of s. 261(1) of the NLC is not just a case of non-compliance with some practical guidelines in the Code - a mere irregularity - but it is an illegality which strikes at the root of the proprietor's right to be heard.

Sub-section (2) of s. 258 states that a chargee on whose application the order was made shall prepare the conditions of sale, in accordance with the terms of the order and any determination thereunder by the Registrar of the court. In our present appeal, the effects of extending the time of payment is to cause a material change in the condition of sale and thus render it no longer in accordance or within the terms of the original order and determination made by the Registrar. Consequently the amended conditions of sale bearing some different terms or directions from the original conditions has to be served again in accordance with s. 258(1)(a) of the NLC on the chargor. Failure to do so is a clear transgression of the statutory provisions of that section. Moreover hearing of the originating summon on the application to extend time, without service to the chargor, is perceptibly not in accordance with the law relating to civil procedure - (see s. 256(2) NLC).

Under ss. 258 and 261 the chargor is not only given the opportunity to show cause as to why his property should not be sold but also to participate in the deliberation on matters affecting his interest, such as the reserve price, the time, venue and conditions of sale. Over and above this, the SAR appears to have completely ignored the subsequent order setting aside the date of extension as well as the various contentious applications, objections and dissentious communications between the parties. The

purchaser, on the other hand, inspite of his awareness of the contentious situation and the subsequent order setting aside the extension date, unheedingly went on to apply and obtain the certificate under s. 259(3) of the NLC and subsequently to register the property.

We are unable to say whether this *faux pas* was tainted with *mala fides* and so describe it as a fraud but we would certainly conclude this conduct as being a serious impropriety or in the words of Walsh J in the *Australia's High Court Case of Forsyth & Anor v. Bundell & Anor* (1973) 129 CLR 477, 'conduct which amounts to a reckless sacrificing of the interest of the mortgagor'.

In any event, we are satisfied that the certificate issued by the SAR was *ultra vires* the statutory provision of the NLC and the title was unlawfully acquired by the purchaser. This finding by itself would have rendered the title of the purchaser defeasible under para (c) of s. 340(2) of the National Land Code and under such circumstances the learned judge had arrived at a correct decision when he made the order.

[33] In *United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd (No. 2)* [1988] 3 MLJ 352 at p. 356, Edgar Joseph Jr J (as he then was) when dealing with the effect of registration obtained by means of a void and insufficient instrument, said:

In these circumstances, *the charge having been registered in breach of an explicit statutory prohibition imposed on the title to the charged land pursuant to the provisions of s. 120 of the Code, the title or interest of the chargee is defeasible since registration thereof had been obtained by means of an insufficient or void instrument (s. 340(2)(b)) and also because the Registrar of Titles, in registering the charge, had acted ultra vires the powers conferred upon him: s. 340(2)(c). The defence of estoppel accordingly fails since there cannot be an estoppel to evade the plain provisions of a statute*: *Jagabandhu v. Radha Krishma* ILR 36 Cal 920, particularly when as here, the non-compliance goes to the root of the thing. In other words, *if the terms of a statute are absolute and do not admit of any relaxation or exemption, anything done in contravention thereof, will be ultra vires and no person can be estopped from putting forward the contention that what was done was illegal or void*: *University of Delhi v. Ashak Kumar Kumarasan* AIR 1968 Delhi 131. (emphasis added)

[34] Likewise in the present case the defendant, even if he is a trespasser, cannot be estopped from challenging the plaintiff's title which title on the face of it, had been registered in clear breach of s. 214A of the NLC without the approval of the ELB. The registration had been obtained *ultra vires* the provision of s. 214A of the NLC and the plaintiff having gotten on to the title illegally cannot now have the *locus* to commence an action for trespass.

[35] In such cases the question of the need for a frontal attack or challenge to the title by a party having the *locus* to do so does not arise because one is dealing with an illegal act prohibited by the clear words of s. 214A of the NLC. The plaintiff admitted that it does not have the ELB's approval. Having become a registered owner illegally and unlawfully and in breach of

s. 214A of the NLC, the plaintiff's title is defeasible and indeed the Registrar of Land Titles, having realised that in his coming to court and informing the plaintiff's counsel of his stand, should take steps to cancel the said registration done in violation of s. 214A of the NLC and *ultra vires* that provision. The Registrar of Land Titles cannot disregard the clear provision of the law prohibiting such a registration without the approval of the ELB. He must of necessity follow the law and in this case to reject a transfer for registration of an estate land without the approval of the ELB.

[36] It can be said that the terms of the statute here admits no relaxation or exemption. The prohibition is clear not just in prohibiting a transfer but even stretching before that to prohibiting a conveyance and a disposal. In other words, even entering into a sale and purchase agreement to dispose of an estate land is declared to be illegal with the vendor having committed an offence. The relevant provisions in s. 214A of the NLC are highlighted below:

> s. 214A. Control of transfer of estate land.
>
> (1) Notwithstanding anything contained in this Act, no estate land is capable of being transferred, conveyed or disposed of in any manner whatsoever, unless approval of such transfer, conveyance or disposal has first been obtained from the Estate Land Board (hereinafter referred to as "the Board") established under sub-section (3).
>
> (2) The Registrar shall not register any instrument of transfer of such land under Part Eighteen of this Act unless such instrument is accompanied by a certificate of approval granted by the Board.
>
> ...
>
> (4) The proprietor or any co-proprietor of any estate land desiring to transfer, convey or dispose of in any manner whatsoever such land shall, together with the person or persons to whom the land is to be transferred, conveyed or disposed of, jointly submit an application to the Secretary of the Board in Form 14D.
>
> ...
>
> (10A) (a) Any person who transfers, conveys or disposes of or attempts to transfer, convey or dispose of in any manner whatsoever, any estate land in contravention of sub-section (1), shall be guilty of an offence and shall on conviction be liable to imprisonment for a term of not less than one year and not more than three years and to a fine not exceeding ten thousand ringgit;
>
> (b) For the purposes of this section, the execution of an agreement to convey or dispose of the whole of an estate to two or more persons, or to convey or dispose of any portion or portions of an estate land to one or more persons, without the approval of the Board, shall be conclusive proof that the estate land is conveyed or disposed of in contravention of sub-section (1); and any act to demarcate an estate land or to cause or permit the demarcation of

A estate land otherwise than in accordance with the provisions of this Act shall be *prima facie* proof that the person so acting, causing or permitting attempts to transfer, convey or dispose of the estate land in contravention of sub-section (1).

(11) For the purpose of this Act "estate land" means any agricultural land
B held under one or more than one title the area or the aggregate area of which is not less than 40 hectares and the alienated lands constituting such area are contiguous.

(12) For the purpose of this Act, alienated lands held under final title or qualified title or a combination thereof, shall be taken to be contiguous
C notwithstanding that they are separated from each other only by such land as is used, required or reserved for roads, railways or waterways. (emphasis added)

[37] It is common ground that the subject land is an estate land caught by the prohibition in s. 214A of the NLC. Whilst the plaintiff admitted that it
D had not obtained the ELB's approval for the transfer, it nevertheless contended that the prohibition does not apply in a post-transfer situation but only in a pre-transfer stage of conveyance and disposal where such an agreement may be struck down as null and void for illegality. It was also submitted by the plaintiff that the prohibition does not apply to a case where the Registrar of Land Titles had exercised its powers and discretion pursuant
E to Part 18 of the NLC under "Registration of Dealings".

[38] However the language of s. 214A(1) of the NLC is crystal clear in that an estate land is not capable of being transferred without the approval of the ELB. To say then that the prohibition no longer applies once the transfer has
F been effected is to do violence to the clear words of prohibition and to grant a license to the Registrar of Land Titles to disregard the prohibition entirely once the transfer is registered in breach of the provision. That would be to denude s. 214(2) of the NLC of its clear meaning that the Registrar shall not register such a transfer and to transform the prohibition into a permission once the registration is effected in contravention of the prohibition.

G

The Direct Or Frontal Challenge Point And Locus Of The Defendant

[39] The plaintiff had been at pains to point out that a squatter has no right whatsoever to challenge the plaintiff's title and right to claim damages for trespasses well as an eviction order. The case of *Sidek Hj Muhamad & Ors. v.*
H *The Government Of The State Of Perak & Ors* [1982] CLJ 244; [1982] CLJ (Rep) 321 (FC) was referred to where it was held that:

(1) It is clear beyond doubt that the appellants cannot succeed in their action because they are squatters. **Squatters have no right either in law or in equity**. It does not lie in their mouths to assert that they used and
I occupied the land as squatters.

(2) ... It is well established that a Court of equity will never assist squatters to resist an order of possession illegally acquired; it will never intervene in aid of wrong-doers ... (emphasis added)

[40] There was also reference made to the case of *Punca Klasik Sdn Bhd v. Foh Chong & Sons Sdn Bhd & Ors* [1998] 1 CLJ 601 at p. 603 where the pronouncement was made that:

[7] Squatters have no legal standing in law or in equity, and they can be ousted at will. ...

[41] Learned counsel for the plaintiff quoted *in extenso* from the English Court of Appeal case of *McPhail v. Persons, Names Unknown; Bristol Corporation v. Ross and Another* [1973] 3 WLR 71 at p. 74 where Lord Denning MR penned the propositions of law as follows with respect to squatters:

2. The Law as to squatters

What is a squatter? He is one who, without any colour of right, enters on an unoccupied house or land, intending to stay there as long as he can. He may seek to justify or excuse his conduct. He may say that he was homeless and that this house or land was standing empty, doing nothing. But this plea is of no avail in law. As we said in *Southwark London Borough Council v. Williams* [1971] Ch 734, 744:

> If homelessness were once admitted as a defence to trespass, no one's house could be safe. ... So the courts must, for the sake of law and order, take a firm stand. They must refuse to admit the plea of necessity to the hungry and the homeless: and trust that their distress will be relieved by the charitable and the good.

(i) The Remedy Of Self-help

Now I would say this at once about squatters. The owner is not obliged to go to the courts to obtain possession. He is entitled, if he so desires, to take the remedy into his own hands. He can go in himself and turn them out without the aid of the courts of law. This is not a course to be recommended because of the disturbance which might follow. But the legality of it is beyond question. The squatters were themselves guilty of the offence of forcible entry contrary to the Statute of 1381 (4 Ric. 2, stat. 1, c. 7). When they broke in, they entered "with strong hand" which the statute forbids. They were not only guilty of a criminal offence. They were guilty of a civil wrong. They were trespassers when they entered, and they continued to be trespassers so long as they remained there. The owner never acquiesced in their presence there. So the trespassers never gained possession. The owner, being entitled to possession, was entitled forcibly to turn them out: see *Browne v. Dawson* (1840) 12 Ad & El 624. As Sir Frederick Pollock put it in his book on Torts:

A trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner: see *Pollock on Torts*, 15th ed. (1951), p. 292.

[42] At p. 78 the Master of the Rolls concluded as follows:

> 4. Conclusion
>
> ... My conclusion is that, **when the owner of a house comes to the court and asks for an order to recover possession against squatters, the court must give him the order he asks**. It has no discretion to suspend the order. But, whilst this is the law, I trust that owners will act with consideration and kindness in the enforcing of it - remembering the plight which the homeless are in. (emphasis added)

[43] One would have no quarrel with the propositions of law above in a case where the landlord's title or the owner's title is not challenged but merely a case where the defendant is raising some justification to remain on the land. However the factual matrix in the present case is different. Here the case has not proceeded to the defendant's case yet but during the plaintiff's case the defendant had challenged the plaintiff's title by stating that it had not complied with s. 214A of the NLC and that it had been registered as owner illegally.

[44] Ordinarily a frontal challenge would be necessary as the alleged act of either fraud or forgery would have to be proved and a mere allegation alone is not enough. However here the fact of no approval of the ELB is now not disputed by the plaintiff. In plain language the plaintiff admits that it had the subject land transferred to it in breach of s. 214A's express prohibition and now as registered owner, it can exert its title against the whole world until its registration is set aside. Whilst the plaintiff does not accept the consequence of his illegal act and indeed argued that its title is indefeasible until it is set aside, the Court can certainly pronounce on its consequence as a result of a breach of the clear prohibition under s. 214A of the NLC.

[45] Thus the cases that made reference to a need for a frontal challenge on the registered title of the plaintiff as owner before its claim for possession can be thwarted and defeated must be read as applying to cases where the defendant are alleging the vitiating factors of fraud or forgery and has yet to prove them. Under such circumstances the registered owner's title is good against the whole world until it is set aside.

[46] That was clearly laid down in the Court of Appeal's case of *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 5 MLJ 136 at p. 539 (CLJ); p. 146 (MLJ):

> [9] I now turn to s. 340(2). This carves out three circumstances in which the title of 'the person for the time being registered as proprietor' 'shall not be indefeasible'. In *Kesarmal & Anor v. Valliappa Chettiar* [1954] MLJ 119, the Privy Council held that the latter phrase means 'that the title of a proprietor is liable to be defeated'. A registered proprietor's title is - to use the words of the Judicial Committee - 'liable to be defeated' only in an action brought for that purpose. In other words, there cannot be a

collateral attack upon a registered title. This reinforces the point I made earlier in this judgment. It follows that s. 340(2) qualifies s. 340(1) to afford a registered proprietor interim protection of his or her title. Put differently, the title of a registered proprietor remains indefeasible until it is successfully impeached in proceedings properly brought for that purpose by a person having *locus standi* to bring an action. Let me illustrate. V is the registered proprietor of Blackacre and holds the issue document of title. R, pretending to be V obtains a duplicate issue document to Blackacre. R then transfers Blackacre to P for valuable consideration. P is innocent. P would acquire a title to Blackacre that is indefeasible against the whole world except V or any person claiming through or under V. So, if P brings an action for ejectment against T, a trespasser on Blackacre, T cannot resist those proceedings by alleging that P's title is defeasible because of the forgery. Neither will T succeed in an action to impeach P's title because he lacks standing. However, P's title remains defeasible as against V and V may bring an action to recover Blackacre from P.

[47] Section 340 of the NLC 1965 is reproduced below:

340. Registration to confer indefeasible title or interest, except in certain circumstances.

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible:

(a) in any case of **fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy**; or

(b) where registration was obtained by **forgery**, or by means of an **insufficient or void instrument**; or

(c) where the title or interest was **unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law**.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser. (emphasis added)

[48] The same principle was reiterated by the Court of Appeal in *Wong Yew Kwan v. Wong Yu Ke & Anor* [2010] 2 CLJ 703; [2009] 2 MLJ 672:

> [4] In my judgment the learned judge was entirely correct in striking out the appellant's pleading as being plainly and obviously unsustainable. It is to be found in s. 340(1) of the National Land Code to which she adverted in her judgment. That section immunises the title of a registered proprietor from impeachment save in the limited circumstances that are housed in sub-s. (2), namely, registration that has been occasioned by fraud or forgery or by an insufficient or void instrument. In the present case, the appellants sought to rely on the fraud exception. But, as correctly pointed out by the learned judge, **mere general allegations of fraud are insufficient to constitute a pleaded case of fraud**.
>
> [5] As for authority, I need go no further than *Teh Bee v. K Maruthamuthu* [1977] 2 MLJ 7, which supports the proposition that even if the registered proprietor acquired his title unlawfully, that is to say, in breach of written law, he may nevertheless assert it against the whole world until proceedings are brought to remove him from the register. In that case, the defendant was in occupation of certain land of which the plaintiff was the registered proprietor. He had been there for a very long time - since 1952. He occupied it by virtue of a temporary occupation licence which had been issued to him by the appropriate authority. The plaintiff had obtained registration of her title in breach of the express provisions of the Code which the State Authority had failed to observe. The plaintiff brought an action against the defendant in the magistrate's court for vacant possession. In his defence, the defendant denied that the plaintiff was the registered proprietor of the land. *He said that the State authority had acted unlawfully in issuing the title to the plaintiff. He also said that the plaintiff's title was invalid because it had been obtained by fraud, misrepresentation and by unlawful means. He however did not file an action against the plaintiff and the State Authority claiming a declaration of invalidity and consequential orders. There was simply no frontal attack on the plaintiff's title. This proved fatal. Because, what remained was only the issue whether the plaintiff's name appeared on the register. It did. And on that ground she was entitled to succeed*. (emphasis added)

[49] It is only too true that allegations of fraud are insufficient to constitute a pleaded case of fraud. If a mere allegation of fraud or forgery can defeat a registered proprietor right flowing from his title, then s. 89 and s. 340(1) of the NLC would be devoid of its meaning and there would be no certainty and value in having one's name registered against a title. However where one's registration is not disputed as having being done in breach of an express prohibition of law making that registration illegal, then the court may take cognisance and apply the consequences of registration arising from either a void or insufficient instrument under s. 340(2)(b) or through an unlawful exercise of power under the law under s. 340(2)(c) of the NLC.

[50] Where we have an admitted illegal act staring at us in the face, we cannot ignore it and pretend nothing has happened until the title is set aside. Such a registered owner cannot be allowed to assert his right as a proprietor for to do so is to recognize his title that had been obtained illegally. It would

also be to openly allow a breach of an express prohibition in s. 214A of the NLC to continue with impunity and that would be inimical to the proper administration of registration of land titles under a Torrens system as we know it.

Decision

[51] The plaintiff is not without its remedy. There being a total failure of consideration, the plaintiff may proceed to obtain a full refund of all monies paid for the subject land and even claim for damages arising out of what appears to be the previous owner's negligent act or that of its agent. However, learned counsel argued that the value of the land has multiplied manifold. Again that would not present a problem for the plaintiff who may want to obtain a power of attorney from the previous owner to file a similar claim for possession for the period when it could not sue the defendant as the title should have been rightly in the previous owner's name.

[52] The plaintiff must undo what it has done; it must obtain registration in the proper way in compliance with s. 214A of the NLC. As a previous approval from the ELB had been obtained for the subdivision of the bigger piece of land of which the subject land is a part, there would appear to be no problem in getting the relevant approval of the ELB.

[53] In the upshot I was constrained to dismiss the plaintiff's claim with costs of RM50,000.